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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

MARSHALL SPIEGEL,

Petitioner,

v.

CITY OF CHICAGO, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is it clearly established that it is a Fourth Amendment seizure when a police officer stops a civilian and prevents him from going to his property, but does not otherwise detain him or restrict his movement?

Is it clearly established that any non-consensual restriction on a civilian's movement by a police officer constitutes a Fourth Amendment seizure?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Seventh Circuit Court of Appeals were Marshall Spiegel, Jeffrey Wilson, John Martin, Andrew Martorano, and the City of Chicago.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
JURISDICTION IN THE DISTRICT COURT	4
REASONS FOR GRANTING THE WRIT	5
Summary	
1. The Seventh Circuit Opinion Conflicts with This Court's Holdings that Coercive Police Actions are Subject to the Fourth Amendment's Command of Reasonableness	6
2. The Decision of the Seventh Circuit Holding that Restricting a Citizen's Freedom of Movement is Not a Clearly Established Seizure Creates a Conflict Among the Circuits	10
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Davis v. Mississippi, 394 U.S. 721 (1969) 8

Florida v. Bostick, 501 U.S. 429 (1991) 5, 7, 8, 9, 11

INS v. Delgado, 466 U.S. 210 (1984) 7

Maryland v. Wilson, 1997 U.S. LEXIS 1271 (1997) 5, 8

Michigan v. Chesternut, 486 U.S. 567 (1988) 5, 7, 9

Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990) 9

Morgan v. Woessner, 997 F.2d 1244 (CA9 1993) 10

People v. Arteaga, 274 Ill. App. 3d 781 (3d Dist. 1995) 11

People v. Wilson, 953 F.2d 116 (CA4 1991) 10

Terry v. Ohio, 392 U.S. 1 (1968) 5, 6, 8, 9

Union Pac. R. Co. v. Botsford, 141 U.S. 250 (1891) 6

United States v. Barry, 670 F.2d 583 (CA5 1982) 11

United States v. Berry, 670 F.2d 583 (CA5 1982) 11

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 8

United States v. Brumfield, 910 F. Supp. 1528 (D.Colo. 1996) 11

United States v. Elsoffer, 671 F.2d 1294 (CA11 1982) 11

United States v. Hooper, 935 F.2d 484 (CA2 1991) 10

United States v. Lambert, 46 F.3d 1064 (CA10 1995) 11

United States v. Low, 887 F.2d 232 (CA9 1989) 11

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 9

TABLE OF AUTHORITIES – Continued

Page

United States v. McSwain, 29 F.3d 558 (CA10 1994) 11

United States v. Place, 462 U.S. 696 (1982) 9

United States v. Thompson, 712 F.2d 1356 (CA11 1983) 11

PETITION FOR WRIT OF CERTIORARI

Marshall Spiegel respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 4, 1997, in order to resolve the conflict between that ruling and prior rulings of this court and rulings of other Circuit Courts of Appeals, and to settle important questions concerning the protections afforded by the Fourth Amendment to the United States Constitution.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit that gives rise to this petition is published at 106 F.3d 209 (CA7 1997). It is reprinted in the Appendix hereto at page App. 1. The opinion of the United States District Court is unpublished and is reprinted in the Appendix at page App. 8.

JURISDICTION

On March 6, 1996, the United States District Court for the Northern District of Illinois entered judgment in favor of all respondents on petitioner's federal claim that respondents violated his Fourth Amendment rights. Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Seventh Circuit. On February 4, 1997, the Court of Appeals affirmed the district court's decision. On April 30, 1997, this court granted petitioner

an extension of time to June 4, 1997, to file his Petition for Certiorari.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

a) The Fourth Amendment to the United States Constitution.

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

b) 42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On July 18, 1994, petitioner Marshall Spiegel sought access to the apartment and storage area that he rented at 5701 N. Sheridan Road, Chicago, Illinois, but was stopped by respondent Chicago police officers Wilson, Martin and Martorano who ordered him not to go into the building and threatened to arrest him if he did not obey this command. App. 20-21. The officers acted at the request of the owner of the building, Hollywood Towers Condominium Association, which was in the process of evicting petitioner and had obtained an order for possession of the plaintiff's apartment which had not yet been enforced by the Cook County Sheriff's Department, the agency which, under Illinois law, is authorized to perform evictions. *Id.* Petitioner was aware that he would soon be evicted, and was attempting to gain access to the building in order to arrange for removal of his belongings and the cleaning of his apartment. As a result of the acts of respondents petitioner was unable to prepare the apartment for his move-out, lost his personal belongings and his security deposit, and suffered mental anguish and loss of liberty. App. 21.

Petitioner filed suit in state court alleging that the actions of the individual police officers violated his rights under the Fourth Amendment to the United States Constitution to be free from unreasonable seizures and also violated Illinois law. Respondents removed the case to United States District Court on the basis of federal question jurisdiction and then moved to dismiss on the ground, *inter alia*, that they were entitled to qualified immunity on the Fourth Amendment claim. The District

Court, although it recognized that "given the police officers were informed that the landlord had no right to self-help forcible eviction, to serve as enforcers of that wrongful action, could certainly be deemed unreasonable" (App. 16), granted respondents qualified immunity on the ground that it was not clearly established that they had seized the plaintiff within the meaning of the Fourth Amendment, and remanded the state claims to state court.

Plaintiff appealed and the Seventh Circuit Court of Appeals affirmed. The court ruled that even if the officers violated Spiegel's Fourth Amendment rights it was not clearly established that a person is seized if an officer prevents him from going where he wants to go but does not otherwise restrict his freedom of movement. App. 6. The court held that the officers' conduct was not contrary to precedent and was not so shocking as to render precedent unnecessary, and that therefore the officers were entitled to qualified immunity. *Id.*

JURISDICTION IN THE DISTRICT COURT

The District Court had jurisdiction over the case subject to federal removal jurisdiction, 28 U.S.C. § 1441, and had original jurisdiction under 28 U.S.C. §§ 1331 and 1343.

REASONS FOR GRANTING THE WRIT

Summary

It has been a touchstone of Fourth Amendment jurisprudence that any order by a police officer to a civilian to go, or not to go, to a certain place constitutes a seizure of that person which must be justified, under the Fourth Amendment, as reasonable. *Terry v. Ohio*, 392 U.S. 1 (1968); *INS v. Delgado*, 466 U.S. 210 (1984); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Florida v. Bostick*, 501 U.S. 429 (1991); *Maryland v. Wilson*, 1997 U.S. LEXIS 1271 (1997). Here, the Seventh Circuit turned that jurisprudence on its head and declared that a police officer's mandatory command to a person which restricted that person's freedom of movement was not a clearly established seizure, and that the respondents were therefore entitled to qualified immunity, where the officer prevented the civilian from going where he wanted to go but did not otherwise detain him.

Rather than starting from the principle that the Fourth Amendment forbids police officers to restrict the actions of civilians unless the restriction is reasonable, the Seventh Circuit opinion presumed that such restrictions, even if they were blatantly unreasonable, would not give rise to a damages action unless a factually identical restriction had previously been ruled unconstitutional. Damages actions under 42 U.S.C. § 1983 are a preeminent means of giving force to the Constitution, and the Seventh Circuit decision effectively immunizes a vast array of police conduct from such actions, thereby substantially narrowing the effective reach of the Fourth Amendment and allowing a wide range of unreasonable

police conduct to go unchecked. Because the Seventh Circuit decision conflicts with prior decisions of this Court and with decision of other Circuit Courts of Appeals, and because of the importance of determining the constitutionality of unreasonable police orders to civilians not to engage in lawful conduct, this court should issue a writ of certiorari to the Seventh Circuit Court of Appeals, accept this case for plenary consideration, and reverse the decision below.

1. The Seventh Circuit Opinion Conflicts with This Court's Holdings that Coercive Police Actions are Subject to the Fourth Amendment's Command of Reasonableness.

In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court stressed the importance of the Fourth Amendment in protecting the liberties of citizens, stating:

> [T]his Court has always recognized "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

392 U.S. at 9. The Court drew a sharp distinction between consensual encounters, which do not constitute a seizure, and situations where an "officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen (where we) may conclude that a 'seizure' has occurred." 392 U.S. at 19, n. 16. The Court held that a non-consensual stop constituted a seizure that

must be measured against the Fourth Amendment's command of reasonableness, and that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 19.

This Court has never retreated from this definition of seizure. *Michigan v. Chesternut*, 486 U.S. 567 (1988), held that in determining whether there was a seizure the court must look to whether the police "intrude upon respondent's freedom of movement" or "control the direction or speed of his movement." 486 U.S. at 575. In *Chesternut* this Court held that there was not a seizure since the officer's action "would not have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business," (*id.* at 569), and "was not 'so intimidating' that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business." *Id.* at 576, citing *INS v. Delgado*, 466 U.S. 210, 216 (1984).

Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382 (1991), stressed that an encounter between police and an individual triggers Fourth Amendment scrutiny when it "loses its consensual nature," and rejected limiting seizures to situations in which a person did not feel "free to leave," noting that in some factual situations this was not a meaningful question, and that:

> the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. This formulation follows logically from prior cases and breaks no new ground. We have said before that the crucial test is whether, taking

> into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Chesternut*, at 569.

Bostick, 111 S. Ct. at 2387. This Court refused to change its prior holdings as to seizures, stating that:

> We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.

Id.

Maryland v. Wilson, 1997 U.S. LEXIS 1271, analyzed a police order to a car passenger to exit as a seizure, even though there was no detention or restriction of movement beyond the order itself. Slip op. at 12 n. 3. In *Wilson* there was not a complete restriction on the movement of the passenger and certainly no detention, but this court was clear that there was nevertheless a seizure. *See also*, Justice Stevens' dissent in *Maryland v. Wilson*, slip op. at 21 n. 8 ("The order to the passenger is unquestionably a 'seizure' within the meaning of the Fourth Amendment. As we held in *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 'The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1 [1968].' ").

The Seventh Circuit decision also conflicts with numerous cases from this court holding that stopping or hindering a person from proceeding in their travel, but not otherwise detaining them, constitutes a seizure. *See, e.g., Michigan Department of State Police v. Sitz*, 496 U.S. 444, 450 (1990) ("a seizure occurs when a vehicle is stopped at a checkpoint"); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) (even if the vehicles are only slowed this amounts to a seizure); *United States v. Place*, 462 U.S. 696, 708 (1982) (detention of luggage for ninety minutes where "such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return" constituted Fourth Amendment seizure).

The test for seizures repeatedly articulated by this Court is thus clear – a person has been seized if an officer has "in some way restrained the liberty of a citizen" (*Terry*), "intruded upon respondent's freedom of movement" or "control[led] the direction or speed of his movement" (*Chesternut*), or "communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Chesternut, Bostick.* The Seventh Circuit decision in this case, however, refused to recognize this clearly established law and held that officers were immune from liability for restraining the liberty of a citizen, intruding upon and controlling the direction of a citizen's movement, and ordering a citizen not to go about his business. This Court should grant certiorari in this case to reject this dangerous restriction on the Fourth Amendment.

2. The Decision of the Seventh Circuit Holding that Restricting a Citizen's Freedom of Movement is Not a Clearly Established Seizure Creates a Conflict Among the Circuits.

Other Circuit Courts of Appeals have held that it is clearly established that police conduct which restricts a civilian's freedom of movement but does not result in the detention of the civilian is a seizure which must be evaluated under the Fourth Amendment.

In *People v. Wilson*, 953 F.2d 116 (CA4 1991), the Fourth Circuit found that the officers' continued questioning of a civilian constituted a seizure even though he was "not physically restrained by the police or other factors from moving through the airport terminal." *Id.* at 122. The court stated that "freedom to leave means fundamentally the freedom to break off contact, in which case officers must . . . . leave the passenger alone." *Id.* The Ninth Circuit decided similarly in *Morgan v. Woessner*, 997 F.2d 1244 (CA9 1993), where it affirmed a jury verdict in favor of the plaintiff and rejected a qualified immunity defense, holding that "When a citizen expresses his desire *not* to cooperate, continued questioning cannot be deemed consensual. . . . We find that Morgan's unequivocal expression of his desire to be left alone demonstrates that the exchange between Morgan and (defendant) was not consensual. Because the exchange was nonconsensual we do not hesitate to find that Morgan was indeed seized. . . . " *Id.* at 1253-54. In *United States v. Hooper*, 935 F.2d 484 (CA2 1991) the Second Circuit held that "a seizure for the purposes of the Fourth Amendment is not defined by whether an individual has halted his forward progress in response to police conduct, but rather is

defined by the coercive nature of the police conduct." *Id.* at 489. And in *United States v. Barry*, 670 F.2d 583 (CA5 1982), the Fifth Circuit held that "blocking an individual's path or otherwise intercepting him to prevent his progress in any way" indicates a seizure, and that a seizure should be found if a person's "freedom had been limited." *Id.* at 597. *See also, United States v. McSwain*, 29 F.3d 558 (CA10 1994) (officer's continued questioning of driver after reasonable suspicion evaporated constituted a seizure, because the officer's conduct would "indicat[e] 'to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Id.* at n. 1, quoting *Florida v. Bostick*, 111 S. Ct. at 2387); *People v. Arteaga*, 274 Ill. App. 3d 781, 782 (3d Dist. 1995) (stop of a motorist for a few moments constituted a seizure, since "[a] seizure occurs when an officer has restrained a person's freedom of movement by physical force or show of authority.").

The Seventh Circuit decision in this case also conflicts with numerous decisions of other Circuits holding that there is a seizure when an officer retains a civilian's airplane ticket or driver's license and thereby disrupts his travel plans but does not otherwise detain him. *See, e.g., United States v. Low*, 887 F.2d 232 (CA9 1989); *United States v. Berry*, 670 F.2d 583 (CA5 1982); *United States v. Elsoffer*, 671 F.2d 1294 (CA11 1982); *United States v. Lambert*, 46 F.3d 1064 (CA10 1995); *United States v. Thompson*, 712 F.2d 1356 (CA11 1983). *See also, United States v. Brumfield*, 910 F. Supp. 1528, 1532-33 (D.Colo. 1996) (when civilian had to leave a bus an officer's order to carry his bags in a certain way constituted a seizure even though his course of travel was not affected). In such situations the officer

has not restrained the civilian's movement completely – the person is free to walk away without their driver's license or leave the terminal without catching their plane – but the officer has intruded upon the person's freedom of movement and has thus "seized" the person.

The Seventh Circuit decision in this case conflicts with other Courts of Appeals and grants immunity to police officers even when their orders are unreasonable and have no legal justification. This is an important issue and this Court should grant certiorari to reject the Seventh Circuit's restriction on the Fourth Amendment and the liberties of civilians.

CONCLUSION

For all of the above reasons this court should grant the petition for a writ of certiorari.

Respectfully Submitted,

Dated: June 3, 1997

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-1736

MARSHALL SPIEGEL,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, a municipal corporation, LIEUTENANT JEFFREY WILSON, CAPTAIN JOHN MARTIN, in their official capacities as City of Chicago Police Officers, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 5840 – **George M. Marovich,** *Judge.*

ARGUED DECEMBER 4, 1996 – DECIDED FEBRUARY 4, 1997

Before RIPPLE, MANION, and DIANE P. WOOD, *Circuit Judges.*

MANION, *Circuit Judge.* Marshall Spiegel was evicted from his Chicago apartment but left some of his belongings behind. He showed up one day to retrieve them and found the locks had been changed. The building manager would not unlock the door and instead called for assistance from the Chicago police. The police prevented

Spiegel from attempting to enter the apartment and threatened to arrest him if he persisted. Spiegel claims that blocking him from re-entering amounted to a seizure in violation of his Fourth Amendment rights; the City of Chicago contends that a person cannot be seized if he is free to go anywhere else except the one place he wants to enter. We decline Spiegel's invitation to decide a yet undetermined Fourth Amendment issue. Rather, we affirm the district court's order dismissing Spiegel's Fourth Amendment claim because the officers are qualifiedly immune from his suit.[1]

I.

In May 1994 Hollywood Towers Condominium Association sued to evict tenant Marshall Spiegel. The Circuit Court of Cook County granted Hollywood Towers possession of Spiegel's apartment. Spiegel appealed the court's order to the Illinois Appellate Court and moved to stay enforcement of the order. The appellate court denied Spiegel's motion on July 6, 1994. On July 18, Spiegel showed up at his apartment but found the locks had been changed. After a discussion between Spiegel and the building manager, the Chicago police were called. Defendants Lieutenant Jeffrey Wilson, Captain John Martin, and Commander Andrew Martorano responded to the call. According to Spiegel's complaint:

> [D]efendants Wilson, Martin and Martorano refused to allow plaintiff to go to or enter his

---

[1] Spiegel brought other claims arising under state law; these were remanded by the district court to the Circuit Court of Cook County.

> residence, ordering him not to go to or in the residence on that day or at any time in the future, under threat of immediate arrest if he did not obey their command.

First Amended Complaint at ¶ 8.

Spiegel contends that the Chicago police officers knew the Cook County Sheriff's Department had not evicted him when they barred his entry to the apartment. According to the complaint, the defendants are liable under 42 U.S.C. § 1983 for an unconstitutional seizure of his person "in forcing [him] not to enter his home." The district court found his claim to be "unique," but granted the City of Chicago's Rule 12(b)(6) motion to dismiss on the ground of qualified immunity. Spiegel appeals from the district court's judgment, which we review *de novo*, accepting as true the facts alleged in his complaint. *Williams v. Banning*, 72 F.3d 552, 553 (7th Cir. 1995).

II.

The single issue before us is whether Spiegel was "seized" in violation of the Fourth Amendment when the Chicago police officers denied him access to the locked apartment. Spiegel concedes that he was not seized in the traditional sense because he was not physically detained. Quite the contrary, Spiegel could have walked away (and eventually did) at any time. However, Spiegel claims that he was seized because his movement into the apartment was restricted.

We are aware that seizures can take many forms. A person may be seized even though only slightly touched. *California v. Hodari D.*, 499 U.S. 621, 625 (1991). Likewise,

he may be seized if he is not touched at all but submits to an officer's order accompanied by a show of authority, thus restraining his liberty. *Id.* at 626. Based on the sparse record before us (this case comes to us from a motion to dismiss), we find it difficult to say exactly what happened that day when Spiegel showed up at his former apartment. He apparently was not touched by the officers, and while it can be said he yielded to their authority (he was not arrested, so we assume he did not attempt to re-enter his apartment), he may also have been yielding to the reality of his situation: he could not enter his apartment because the locks had been changed. In any event, the only liberty restrained was that of entering the apartment. He certainly was free to leave; indeed, that is what he was persuaded to do.

At oral argument, Spiegel's attorney suggested that the Fourth Amendment was broad enough to cover the type of restriction imposed by the police in this case, and, indeed, contended that any other result would constitute a "remarkable and unprecedented limitation on the scope of the Fourth Amendment." Hyperbole aside, it is unclear what the officers did that was so remarkable: responding to the landlord's complaint, the police stood before a locked door and told Spiegel not to attempt to pass through it. Even without the presence of the police, Spiegel would have been staring at the same locked door of an apartment already repossessed by the landlord.

The district court determined that *Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994), was "remarkably similar" to this case. In *Kernats*, a landlord obtained an order of possession from a state court and ordered the tenants to leave the premises. When they failed to leave, he asked

the local police to cite them for trespassing. A police officer (O'Sullivan) visited the property and ordered the tenants to leave by the end of the day or face arrest. Fearing arrest, they complied, but then filed a § 1983 suit alleging that O'Sullivan unreasonably seized them when he ordered them to leave. The district court found no seizure and dismissed the suit. On appeal, the court divided three ways and could not agree on whether the tenants were seized.

The obvious distinction between this case and *Kernats* is that the Kernats family already was *occupying* its dwelling when visited by the police; Spiegel was not. The Kernats were not told (as Spiegel was) that they could go anywhere but the one place they wanted to go. Rather, they were told that they had to leave the one place they were presently occupying or face arrest. In all events, Spiegel directs us to no case more analogous to the facts of his own than *Kernats*.[2] It is therefore of some significance that the *Kernats* panel did not hold that the family was seized in violation of the Fourth Amendment. Instead, the court upheld the district court's dismissal of the suit on the ground of qualified immunity.

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[2] The cases he relies heavily upon, *Terry v. Ohio*, 392 U.S. 1 (1968), and *McGann v. Northeast Illinois Regional Commuter R.R. Corp.*, 8 F.3d 1174 (7th Cir. 1993), involve individuals who were restricted by the police from going about their own business. In other words, they were not free to leave, whereas Spiegel certainly was. He could have gone anywhere with the exception of his former apartment, which at that point had new locks and was under the total control of his landlord. The only things "seized" may have been some of his possessions he claims were still inside, but Spiegel is not asserting a property seizure in this appeal.

Officers enjoy qualified immunity so long as their conduct did not violate a statutory or constitutional right that was clearly established at the time they acted. *Kernats*, 35 F.3d at 1176 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Even if the officers violated Spiegel's Fourth Amendment rights in the manner he claims (an issue we leave unresolved here), his right not to have the police prevent him from entering an apartment that was in the possession of the landlord was not clearly established at the time the police blocked his attempt to enter. *See Harlow, id.* ("governmental officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). The officers' conduct was not contrary to precedent. *Kernats*, 35 F.3d at 1176 ("we look first to case law on point or in closely analogous areas" to determine if reasonably diligent governmental officials would have known of the law and tailored their conduct accordingly). Nor was it so shocking as to render precedent unnecessary. *Id.* ("one need not cite a case at all if the constitutional violation is obvious"). If anything, the cases cited by Spiegel confirm that the law was unsettled in this area even before *Kernats*, and *Kernats* leaves the law unresolved. Accordingly, we find that the individual officers were entitled to qualified immunity and were correctly dismissed from this suit by the district court.

III.

The officers are qualifiedly immune from Spiegel's suit. We recognize that this decision does little to clarify

an unsettled question of Fourth Amendment law. But because we can affirm the district court for the reasons stated, there is no need to explore uncharted territory. The decision of the district court is

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARSHALL SPIEGEL, Plaintiff, v. CITY OF CHICAGO, a Municipal corporation, Lieutenant JEFFREY WILSON, Captain JOHN MARTIN, and Commander ANDREW MARTORANO, individually and in their official capacities as City of Chicago police officers, Defendants.	)	95 C 5840 Judge George M. Marovich

MEMORANDUM OPINION AND ORDER

Marshall Spiegel ("Spiegel") alleges that his Fourth Amendment right to protection from unreasonable seizures was violated when three City of Chicago police officers ordered him not to enter his apartment. The Defendants argue that (1) Spiegel was not "seized" or (2) if he was seized, then the Defendants are entitled to qualified immunity. Because the Court finds that the Defendants arc entitled to qualified immunity, the Court grants the Defendants motion to dismiss Count I pursuant to Rule 12(b)(6) and remands this action to the Circuit Court of Cook County.

BACKGROUND

For purposes of the Defendants' motion to dismiss, the Court accepts as true the following factual allegations taken from Spiegel's First Amended Complaint. *Bowman v. Franklin*, 980 F.2d 1104, 1107 (7th Cir. 1992). Spiegel was a resident of Unit 7-J of the Hollywood Towers, 5701 N. Sheridan Road. On May 23, 1994, the Circuit Court of Cook County granted Hollywood Towers possession of Unit 7-J. Enforcement of the order of possession was stayed for forty-five days until July 7, 1994. Spiegel appealed the trial court's decision and sought a stay of enforcement of the order of possession pending appeal. The Illinois Appellate Court denied the motion for a stay on July 6, 1994.

On July 18, 1994, Spiegel went to his apartment, but found that the lock had been changed. After a discussion with the building manager, the police were called. Defendants Lieutenant Jeffrey Wilson, Captain John Martin and Commander Andrew Martorano (the "police officers") responded to the call and refused to allow Spiegel entrance to his apartment. Spiegel alleges that the police officers issued this order in spite of their knowledge that he had not yet been evicted by the Cook County Sheriff's police as required by Illinois law. As a result of the police officers' actions, Spiegel claims that he suffered mental anguish, loss of his belongings and economic loss, including loss of his security deposit.

Spiegel filed a complaint in the Circuit Court of Cook County which, after one amendment, the Defendants removed to this Court on the basis of federal question jurisdiction. Count I purports to state a claim under 42

U.S.C. § 1983, alleging that the police officers violated his Fourth Amendment right to be secure in his person, house, papers and effects against unreasonable seizures.

In Count II, Spiegel charges the police officers with the state tort of wrongful eviction. Count III claims that the police officers' actions constituted trespass under Illinois law. In Count IV, Spiegel charges defendant City of Chicago with liability for any state law violations that the police officers may have committed. In Count V, Spiegel demands judgment against defendant City of Chicago in the amount awarded to him against the police officers.

DISCUSSION

In deciding Rule 12(b)(6) motion to dismiss, the court tests the sufficiency of the complaint, but does not decide the merits of the case. Indeed, the court must construe the complaint's allegations in the light most favorable to the plaintiff – taking all well-pleaded facts as true. *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 733 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987). Moreover, the complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411 (7th Cir. 1986). A complaint must allege sufficient facts to set forth the essential elements of the cause of action, however. *Conley*, 355 U.S. at 41.

A. Fourth Amendment Claim

Spiegel alleges that the police officers unreasonably seized him, violating his Fourth Amendment rights.[1] The Fourth Amendment prohibits unreasonable seizures of both a person and his property. To state a claim under the Fourth Amendment, a plaintiff must show that there was a seizure and that it was unreasonable. *Kernats*, 35 F.3d at 1177.

1. Seizure

A Fourth Amendment seizure occurs when a police officer "by means of physical force or show of authority . . . in some way restrains the liberty of [the] citizen." *Terry v. Ohio*, 392 U.S. 1 (1968); *see also United States v. Mendenhall*, 446 U.S. 544, 552 (1980); *Carter v. Buscher*, 973 F.2d 1328, 1333 (7th Cir. 1992). To establish that a seizure

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[1] Spiegel alleges only that his Fourth Amendment, not his substantive due process rights, were violated. If Spiegel had also alleged that his substantive due process rights were violated, we would dismiss that allegation because it would be superfluous. *Kernats v. O'Sullivan*, 35 F.3d 1171, 1182. In *Albright v. Oliver*, the Supreme Court stated that "there is no need to differentiate between a so-called Fourth Amendment theory and a substantive due process theory because they are coextensive." *Albright v. Oliver*, 114 S. Ct. 807, 831 (1994) (Stevens, J., dissenting). The Supreme Court also stated in *Albright* that "where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing these claims.' " *Albright*, 114 S. Ct. at 813 (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

occurred, the person must show that there was a "meaningful interference, however brief, with an individual's freedom of movement." *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984). A typical seizure involves an almost complete restriction of movement. *Kernats*, 35 F.3d at 1180. Where there was not a physical restriction of movement, the court must determine whether, in light of the totality of the circumstances, a reasonable person would not believe they were free to leave. *INS v. Delgado*, 466 U.S. 210 (1984); *Mendenhall*, 446 U.S. at 554.

Spiegel's case presents a rather unique question – whether someone who was free to go anywhere except the one place he or she wanted to go, was seized by the police. Generally, a seizure involves just the opposite – a person is not permitted to go anywhere but one place, usually a police station or police car. These odd facts make it difficult to apply typical Fourth Amendment case law to this situation.

Fortunately, the Seventh Circuit recently decided a case remarkably similar to the one here. *Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994). In *Kernats*, a landlord who had obtained an order of possession from a state court, decided to evict his tenants on his own without the assistance of the Cook County Sheriff's officers, as required by statute. The landlord told the tenants to leave by midnight that day. Midnight passed, but the tenants had not left.

After the tenants failed to leave by the appointed hour, the landlord showed up again at 1:30 a.m., posting "no trespassing" signs around the house. In the morning, he went to the local police and asked them to cite the

tenants for trespassing. A local police officer, O'Sullivan, went out to the property and ordered the tenants to leave by the end of the day or be arrested. Fearing arrest, the tenants packed up all of their things and left by the end of the day.

The tenants filed a Section 1983 suit, alleging that Officer O'Sullivan unreasonably seized them when he ordered them to leave their residence. The district court, holding that there was no seizure, dismissed the claims and the tenants appealed. On appeal, the Seventh Circuit held that the police officers were qualifiedly immune from suit because the law at the time of the incident did not clearly establish that O'Sullivan's conduct amounted to a Fourth Amendment seizure. *Id.* at 1181.

A majority of the *Kernats* court did not decide, however, whether O'Sullivan's actions amounted to a seizure – Judge Flaum, writing the opinion of the court, said the decision was unnecessary to the court's decision that O'Sullivan was immune; Judge Rovner stated that she believed it was a seizure; and Judge Crabb would have held that O'Sullivan's action could not be deemed a seizure because the tenants were not detained. In addition, each judge applied different analyses to reach their opinions. Thus, while this Court cannot look to *Kernats* as determinative of the issue of whether the police officers here seized Spiegel when they told him not to enter his apartment, it must look to the *Kernats* decision for guidance.

The opinion of the court, which Judge Rovner joined, does set forth a test for this Court to follow in determining whether Spiegel has alleged a seizure. Indeed, the *Kernats* court stated that

> we believe that the relevant Fourth Amendment inquiry should examine the circumstances – language, tone of voice, nature of the events leading to the encounter, location, and timing – in light of the nature of the official inducement and the extent of the restriction on the citizen's desired freedom of movement.

Id. at 1183. Thus, *Kernats* directs this Court to consider both the nature of the police inducement and the extent of the restriction of movement imposed by such inducement.

a. Police Inducement

Spiegel alleges that the three police officers threatened to arrest him immediately if he failed to comply with their order to leave the apartment. Thus, Spiegel was faced with an immediate choice – leave or be arrested. In the words of the Seventh Circuit, Spiegel's decision was "informed by both the rock and the hard place." *Id.* at 1179. Unlike the tenants in *Kernats*, who, after Officer O'Sullivan had left, had time to seek "further clarification (perhaps from the Chief of Police, the State's Attorney, or even a private lawyer)," Spiegel had to "make an instantaneous judgment whether to submit or resist." *Id.* at 1180. Thus, it seems that the level of police inducement that Spiegel alleges weighs in favor of a finding that he was seized.

b. Restriction on Spiegel's Freedom of Desired Movement

The Court must also consider the extent to which Spiegel's freedom of movement was restricted. Here, Spiegel alleges that the police officers prohibited him from further attempts to enter his apartment. This claim is slightly different from that alleged in *Kernats*. The *Kernats* tenants were in their home and ordered to pack up and leave – "a serious disruption of movement." Spiegel, on the other hand, was already out of his apartment – the landlord had changed the locks – when the police arrived. The police did not order him out of his apartment; they refused to order his landlord to unlock the door.

The police officers argue that Spiegel had no interest in the apartment and, therefore, denying him access to it does not amount to a major restriction on his movement. The police officers, citing Judge Crabb's concurring opinion in *Kernats*, analogize Spiegel's situation to that of a person who is denied access to a traffic accident site under the threat of coercion.

Of one thing this Court is certain, this case presents a very close question – on the one hand, the amount and the immediacy of police coercion appears greater here than in *Kernats*, while the restraint on Spiegel's freedom of movement was less than that imposed in *Kernats*.[2]

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[2] The second step in determining whether a seizure violated the Fourth Amendment is to determine whether it was "unreasonable." *Kernats*, 35 F.3d at 1181 n.6. Whether a seizure was unreasonable is determined "by balancing the extent of the intrusion against the need for it." *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985)). Here, without any stated

Thus, reviewing the foregoing analysis, and given the relatively unsettled state of the law as reflected in the *Kernats* opinion, this Court is not prepared to find that Spiegel has or has not stated a claim under the Fourth Amendment. More important, such a determination is unnecesary [sic] because the police officers are entitled to qualified immunity.

B. Qualified Immunity

Under the doctrine of qualified immunity, "governmental officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The courts approach the issue using a two-step analysis: (1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? *Kernats*, 35 F.3d at 1176. The plaintiff bears the burden of establishing the existence of a clearly established constitutional right. *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 968 (1988).

To determine whether an officer is immune, the Court must consider whether a reasonable police officer

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justification from the police officers, this Court cannot say that the police officers were reasonable or unreasonable in their restraint on Spiegel's freedom. In addition, given that the police officers were informed that the landlord had no right to self-help forcible eviction, to serve as the enforcers of that wrongful action, could certainly be deemed unreasonable.

could have believed that his conduct was constitutional in light of the clearly established law and the information the officer possessed at the time of the incident. *Jones by Jones v. Webb*, 45 F.3d 178, 183 (7th Cir. 1995). Although it is unnecessary for plaintiff to identify a prior case that addresses the exact factual situation, the law must be clear in relation to the specific facts confronting the officer when he acted. *Id.* at 184.

The decision in *Kernats* provides all the authority this Court needs to make this determination. In *Kernats*, the Seventh Circuit panel was unanimous in holding that the police officer's conduct did not constitute a seizure under clearly established law at the time of the incident and therefore the police officer was entitled to qualified immunity. More important, the *Kernats* court could not determine that the police officer's action in that case violated the Fourth Amendment. Thus, as of September 16, 1994, the date *Kernats* case was decided, it was unclear whether a police officer who orders a holdover tenant to vacate his property under the pain of possible arrest, violated the Fourth Amendment.

The incident in this case occurred on July 18, 1994. Therefore, even if the majority in *Kernats* had held that a seizure had occurred, the law would not have been clearly established on July 18, 1994, the date of the incident between the police officers and Spiegel. In addition, Spiegel has not cited, and the Court has not found, any case which might have clearly established that a seizure

occurred in this situation.[3] Thus, the Court holds that this action is barred by qualified immunity and dismisses Count I.

Having dismissed Count I, the sole basis for jurisdiction, the Court, in its discretion, declines addressing the remaining state law claims and remands them to the Circuit Court of Cook County.

CONCLUSION

For the foregoing reasons, the Court grants the Defendants' motion to dismiss Count I and remands the remaining county of this action to the Circuit Court of Cook County.

ENTER:

/s/ George M. Marovich
GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

DATED: March 6, 1996

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[3] The cases cited by Spiegel merely state the constitutional standard but do not apply them to any case remotely resembling this one. Thus, it cannot be said that the law was clear as it related to these specific facts. In other words, Spiegel has not established that a reasonable officer would have known that he was seizing him, for Fourth Amendment purposes, by refusing him access to the apartment.

United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

MARSHALL SPIEGEL

v

CITY OF CHICAGO et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 95 C 5840

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff take nothing as to Count I and that Count is dismissed with prejudice. The remaining Counts are remanded to the Circuit Court of Cook County.

March 6, 1996
Date

/s/ H. Stuart Cunningham
Clerk

/s/ Frances D'Andreo
(By) Deputy Clerk

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

Marshall Spiegel Plaintiff, v. Lieutenant Jeffrey Wilson Star # 1684, Captain John Martin, and Commander Andrew Martorano, and the City of Chicago, Defendants.	)	95 M1 41396

FIRST AMENDED COMPLAINT

1. Marshall Spiegel was, on and before July 18, 1994 and until July 21, 1994, a legal resident of 5701 N. Sheridan Road, Unit 7-J.

2. Defendants Lieutenant Jeffrey Wilson, Captain John Martin and Commander Andrew Martorano are City of Chicago police officers who, at all times relevant to this complaint, were acting within the scope of their employment. These defendants are sued in their individual capacity.

3. Defendant City of Chicago is a municipal corporation and the employer of defendants Wilson, Martin and Martorano.

4. In 1994 plaintiff was involved in litigation with Hollywood Towers Condominium Association which ultimately led to Hollywood Towers obtaining an order for possession of Unit 7-J of 5701 N. Sheridan Road, Chicago.

5. Pursuant to Illinois law an order for possession of real property in Cook County may be enforced only by the Cook County Sheriff's Department.

6. The order for possession referred to in paragraph 4 above was not enforced until July 21, 1994.

7. On July 18, 1994, plaintiff Marshall Spiegel went to his residence at 5701 N. Sheridan, Chicago, Illinois and attempted to gain access to his residence.

8. On that day defendants Wilson, Martin and Martorano refused to allow plaintiff to go to or enter his residence, ordering him not to go to or in the residence on that day or at any time in the future, under threat of immediate arrest if he did not obey their command.

9. On July 18, 1994, defendants knew that the Cook County Sheriff's Department had not evicted plaintiff from his residence at 5701 N. Sheridan Rd., Chicago, Illinois.

10. As a result of the wrongful acts of defendants Wilson, Martin and Martorano plaintiff was denied access to his residence and to his belongings inside his residence, and was unable to arrange for the removal of his belongings and the cleaning of the apartment.

11. As a result of the acts of the defendants set forth above plaintiff suffered mental anguish, loss of liberty, loss of his residence, loss of his belongings and economic loss including loss of his security deposit.

COUNT I

12. Plaintiff realleges paragraphs 1 through 11.

13. The actions of defendants Wilson, Martin and Martorano in forcing plaintiff not to enter his home violated his rights under the Fourth Amendment to the United States Constitution to be secure in his person, house, papers and effects against unreasonable seizures and 42 U.S.C. §1983 and proximately caused the damages to plaintiff set forth above.

WHEREFORE, plaintiff demands judgment against defendants Wilson, Martin and Martorano, jointly and severally, for compensatory damages in an amount more than $30,000, and, because they acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for punitive damages, plus the costs of this action, attorneys' fees and such other relief as this Court deems equitable and just.

COUNT II

14. Plaintiff realleges paragraphs 1 through 13.

15. The actions of defendants Wilson, Martin and Martorano in barring plaintiff from going to or in his residence proximately caused plaintiff to leave his home, and constituted the tort of wrongful eviction under the laws of the State of Illinois.

WHEREFORE, plaintiff demands judgment against defendants Wilson, Martin and Martorano, jointly and severally, for compensatory damages in an amount more

than $30,000, and, because they acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's rights, for punitive damages, plus the costs of this action, and such other relief as this Court deems equitable and just.

COUNT III

16. Plaintiff realleges paragraphs 1 through 13.

17. Defendants Wilson, Martin and Martorano, individually and jointly, intentionally intruded upon the premises possessed by the plaintiff without legal justification and in violation of Illinois law.

18. This intentional intrusion violated the plaintiff's rights to peaceable and quiet enjoyment of his home and to be free from unreasonable seizures and his right to be let alone.

19. This intentional intrusion proximately caused the damages to the plaintiff set forth above.

WHEREFORE, plaintiff demands judgment against defendants Wilson, Martin and Martorano, jointly and severally, for compensatory damages in an amount more than $30,000, and, because they acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's rights, for punitive damages, plus the costs of this action, and such other relief as this Court deems equitable and just.

COUNT IV

20. Plaintiffs reallege paragraphs 1 through 19.

21. The defendant police officers were, at all times material to this complaint, employees of the defendant City of Chicago and were acting within the scope of their employment, and their acts which violated state law are directly chargeable to the defendant municipality under state law pursuant to the doctrine of *respondeat superior.*

WHEREFORE, plaintiff demands judgment against the City of Chicago plus the costs of this action and whatever additional relief this Court deems equitable and just.

COUNT V

22. Plaintiff realleges paragraphs 1 through 21.

23. Defendant City of Chicago was the employer of defendant police officers at all times relevant to this complaint.

24. These defendants committed the acts alleged above under color of law and in the scope of their employment as employees of the City of Chicago.

WHEREFORE plaintiff, pursuant to 745 ILCS 10/9-102, demands judgment against defendant City of Chicago in the amount awarded to plaintiff against the individual defendants as damages, attorneys' fees, costs and interest, and/or for any settlements reached with these individual defendants, and for whatever additional relief this Court deems equitable and just.

PLAINTIFF DEMANDS A JURY TRIAL

Respectfully submitted,

Dated: September 19, 1995

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